

REPUBLIC OF KENYA

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW

BOARD

APPLICATION NO.32/2007 OF 7TH JUNE, 2007

BETWEEN

MFI OFFICE SOLUTIONS LTD.....APPLICANT

AND

KENYA PORTS AUTHORITY.....PROCURING ENTITY

Appeal against the decision of the Corporation Tender Committee of the Kenya Ports Authority [KPA] dated 25th May, 2007 in the matter of tender NO.KPA/005/2007/PM for Operation of Printing Shop.

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Ms Phyllis N. Nganga	-	Member
Eng. D. W. Njora	-	Member
Mr. P. M. Gachoka	-	Member
Mr. J. W. Wambua	-	Member
Mr. John W. Wamaguru	-	Member

IN ATTENDANCE

Mr. C.R. Amoth	-	Holding Brief for Secretary
Mr. P.M. Wangai	-	Secretariat

PRESENT BY INVITATION FOR APPLICATION NO.32/2007

Applicant, MFI Office Solutions Ltd

Mr. James Mangerere	-	Advocate
Mr. M. Jeevanjee	-	Advocate
Mr. Jignesh Mehta	-	Product Manager
Mr. Danny Socanki	-	Business Manager
Mr. Eliud Siguda	-	Account Manager

Procuring Entity, Kenya Ports Authority

Mr. Raha Jillo	-	Assistant Corporation Secretary
Mr. Yobesh Oyaro	-	Procurement & supplies Manager
Mr. Robert Waiganjo	-	Procurement Officer

Interested Candidates

Mr. Azhar Hamid	-	Managing Director, Printing Systems Ltd
Mr. Nimish Shah	-	Partner, Flora Printers
Ms. Ann N. Aburili	-	Managing Director, Xerodoc Kenya Ltd
Mr. Reuben Mwangi	-	Sales Manager, Xerodoc Kenya ltd

BOARD'S DECISION

Upon hearing the representations of the parties and upon considering the information in all the documents before it, the Board hereby decides as follows:

BACKGROUND

This tender was advertised by the Procuring Entity in the local daily newspapers on 18th and 19th January, 2007. The tender was closed /opened on 28th February, 2007 at 9.00 a.m. in the presence of

parties' representatives. The six bidders who responded to the tender notice were as follows:-

1. MFI Office Solutions Ltd
2. Office Technologies
3. Flora Printers
4. Nisha Printers
5. Printing Systems
6. Xerodoc

Evaluation

The evaluation was carried out in three stages, namely, Preliminary examination, Technical and Financial evaluation stages. The Preliminary examination was carried out to determine the tenders' responsiveness to the tender requirements. Nisha Printers tender was rejected for failing to comply with Clauses 2.15.2.3 and 2.15.2 of the tender document.

The results of the Preliminary examination of the tenders were as tabulated below:

Item	Description of Document	Tenderer				
		MFI	Office Tech	Flora	Printing Systems	Xerodoc
1.	Reg. Certificate VAT, PIN & TCC3	√	√	√	X	√
2.	Tender Security	√	√	√	√	√
3.	Confidential Business Questionnaire and Declaration Form	√	√	√	√	√
4.	Evidence of contracts of similar nature	√	X	√	√	√
5.	Copy of site visit attendance register	√	√	√	√	√

Based on the above information, Office Technologies and Printing Systems were disqualified for failing to submit evidence of contracts for similar services and a copy of Tax Compliance Certificate, respectively.

TECHNICAL EVALUATION

The Evaluation Committee agreed on the scoring guidelines as stipulated below:-

Item	Description	Award of Marks
Item 1	Detailed Work Plan & Performance measure indicators	5 marks a piece for the work plan and performance indicators
Item 2	Audited Accounts	Three ratios are to be computed i.e. current asset, turnover and gearing ratio for each of the financial years. The items together with presentation of accounts will carry 2.5 marks respectively for each year.
Item 3	Company profile, organization structure and CVs of Technical staff	C/profile & Org. structure to get 5 marks each and CVs of technical staff 10 marks
Item 4	List of Equipment	Evidence of ownership 10 marks while the other items i.e. model, year of manufacture, performance details and location earns 5 marks each.
Item 5	Distribution Network	Evidence of transport vehicles 5 marks and location of business premises 5 marks

Item 6	Customer Care	Customer care complaints procedure 5 marks and another 5 marks for giving details of the contact person(s)
	TOTAL	100 Marks

The results of the technical scores were as follows:

		Marks	Flora (A)	MFI (B)	Xerodoc (C)
1.	Work Plan Proposal	5	2	5	4.75
	Performance Measures Indicators	5	2.5	0	4.25
2.	Audited Accounts	5	5	5	5
	Turnover	5	2	5	3
	Current Asset Ration	5	5	5	5
	Gearing Ratio	5	5	4	2
3.	Company Profile	5	5	5	4.25
	Organization Structure	5	3	5	5
	CV's of Technical Staff	10	3	10	4.75
4.	List of Equipment				
	Evidence of Ownership	10	10	0.75	9
	Model	5	3	5	3.25
	Year of Manufacture	5	3	5	3
	Performance Detail	5	1.5	5	3.5
	Location	5	5	0	4.75
5.	Distribution Network				
	Ownership of Transport Vehicle	5	5	5	5
	Physical Location	5	5	5	5

6.	Organization's Customer Care				
	Client Complaints Procedure	5	5	5	4.75
	Name of Contact Person	5	5	5	5
	TOTAL	100	75	79.75	81.25

RECOMMENDATIONS

The Technical Committee recommended all the three tenders to proceed to the next stage of evaluation, the site visit, having attained the cut-off mark of 75 %.

SITE VISITS:

The detailed inspection yielded the following results based on the criteria in Clause 2.33.2 of the tender document:

Evaluation Criteria	Maximum Score	Tenderer		
		Flora Printers	MFI Office Solutions	Xerodoc (K) Ltd
Assessing Facilities & Experience	5	4.33	4.33	4.00
Quality of Workmanship & Finishing with regard to document Production	5	4.00	5.00	4.67
Reliability & Durability of Equipment in use	5	4.00	5.00	4.00
Response to Customers' Requirements	5	4.00	5.00	4.33
TOTAL	20	16.33	19.33	17

The combined Technical and Site visit scores were as follows:

Item	Maximum Score	Tenderer		
		Flora Printers	MFI Office Solutions	Xerodoc (K) Ltd
Initial Technical Evaluation	100	75	79.75	81.25
Site Visit	20	16.33	19.33	17
TOTAL SCORE	120	91.33	99.08	98.25
Score Expressed as a percentage (%) (Score x 100)/120	100	76	83	82

RECOMMENDATION

Arising from the above results the Evaluation Committee recommended the three tenderers, Flora Printers, MFI Office Solutions and Xerodoc (K) Ltd, to proceed to the Financial Evaluation stage each having attained 75% cut-off mark.

FINANCIAL EVALUATION

The Financial bids were opened in the presence of the parties' representatives on 11th May, 2007. The prices quoted by tenderers were as tabulated here below:-

No.	Firm	Total Quoted Price (per unit prices) Kshs. (VAT Exclusive)
1.	M/s Flora Printers	10,720.45
2.	M/s MFI Office Solutions	10,944.92
3.	M/s Xerox Ltd	12,192.12

RECOMMENDATION

The Technical Evaluation Committee recommended award to the lowest evaluated bidder, Flora Printers Ltd.

CORPORATION TENDER COMMITTEE'S [CTC] DECISION

The CTC concurred with the recommendations of the Evaluation Committee and awarded the tender to Flora Printers Ltd, at their quoted rates for a period of five (5) years for being the lowest evaluated tenderer. Letters of notification of award to both successful and non-successful bidders were dated 25th May, 2007.

THE APPEAL

This appeal was lodged on 7th June, 2007 by MFI Office Solutions Ltd against the decision of the Tender Committee of Kenya Ports Authority in the matter of tender No.KPA/005/200 for Operation of a Printing Shop.

The Applicant was represented by Mr. James Mangerere and Mr. M. Jeevanjee, both Advocates while the Procuring Entity was represented by Mr. Raha Jillo Assistant Corporation Secretary. Flora Printers, an interested candidate was represented by Mr. Nimish Shah.

The Applicant raised four grounds of appeal which we have consolidated since they raised similar complaints with regard to the evaluation of the tenders.

Grounds 1, 2, 3 and 4

These are complaints that the Procuring Entity breached Regulation 49 of the Public Procurement & Disposal Regulations, 2006 by failing to compare each tender to the technical requirements set out in the tender document. By so doing the Procuring Entity ended up awarding the tender to a bidder who did not possess the requisite

technical capacity. Such a bid was not competitive. The Applicant argued that it had been servicing the equipment of the successful candidate and knew that they lacked the capacity for the provision of the services required by the Procuring Entity.

The Applicant further alleged that the Procuring Entity breached Regulation 16(5) (a), by failing to evaluate the tenders in accordance with the criteria set out under Section VI of the tender document. It argued that the addendum Ref: MSU/2/1/22 dated 9th February, 2007 was a response to a question that was raised by Mr. Nimish Shah, the proprietor of Flora Printers, during the site visit meeting held at the Procuring Entity's premises on 7th February, 2007. The addendum was inconsistent with the technical specifications contained in Section VI of the tender document, and was intended to suit Flora Printers to enable it to participate in the tendering process. Without the addendum, Flora Printers could not have participated in the tender since its offset printers could not meet the technical specifications which related to digital printers. The Applicant pointed out that although the addendum allowed the suppliers to offer offset printing machines of their own choice, such machines could not perform the task as they could not comply with the technical specifications set out under Section VI of the tender document. In addition, they were neither superior nor equivalent to the technical specifications.

The Applicant further submitted that for the Procuring Entity to have evaluated two different kinds of equipment effectively, it must have used two sets of marking scheme: one for the digital machines and the other for the offset machines. Such a system was open to abuse and had no standard benchmark. Consequently, the entire tendering process was flawed and in breach of the Regulations. In the circumstances, the Applicant appealed that the Board annuls the award of the tender, and re-award it to the rightfully successful bidder, who may not be necessarily be the Applicant.

In response, the Procuring Entity submitted that it advertised the tender under reference in the local daily newspapers on 18th and 19th

January, 2007. Thereafter, it issued the tender document containing the technical specifications to the interested bidders. It stated that the specifications contained at Section VI of the tender document were merely minimum requirements intended to offer guidance to bidders on the requirements of the Procuring Entity. There was no requirement that the equipment should be either offset or digital. It was therefore upon the prospective bidders to demonstrate that they were qualified to be awarded the tender in accordance with Section 31 of the Act regardless of the kind of equipment they offered.

All the tenders received prior to the closing/opening date of the tender were evaluated using the evaluation criteria set out in the tender document. This was the only criteria used in the evaluation and award of the tender to the lowest evaluated bidder. The Procuring Entity argued that, although the Applicant was a previous supplier of machines to the Successful Bidder, it did not necessarily imply that the latter could not provide the printing services required.

The Procuring Entity further submitted that the tender was for provision of printing services, and not for procurement of equipment. It had therefore provided the Schedule of Requirements at Section V of the tender document which indicated their overall needs. Thus, all that was required was for a bidder to demonstrate that their equipment would perform the task.

With regard to the addendum, the Procuring Entity submitted that it was issued in accordance with Section 53 of the Act, and was not intended to favour any bidder. The addendum did not delete the specifications provided under Section VI of the tender document, but only allowed use of other machines which could perform the services required. Therefore, the addendum did not provide the specifications for offset machines, as all equipment were to remain the property of the bidder. It argued that the Applicant should have sought for clarification before the closing of the tender if it had a genuine complaint on the addendum.

Finally, the Procuring Entity submitted that it was satisfied that Offset printers could also provide the services it required.

On his part, Mr. Nimish Shah of Flora Printers submitted that the tender was for provision of Printing Services and had no reference to either offset or digital machines. Upon buying the tender document, Flora Printers noted that the technical specifications contained under Section VI of the tender document, limited the Procuring Entity to a particular kind of machine although the printing services could be provided by other types of machines. Consequently, before the site visit meeting, he sought clarification on the technical specifications through a letter dated 29th February, 2007. He argued that the addendum issued by the Procuring Entity was in response to the request for clarification, and not to a similar question he asked during the site visit meeting.

Mr. Shah also refuted claims by the Applicant that Flora Printers did not have the required technical capacity for printing services. He argued that his firm was the largest printing firm in Mombasa and had the required equipment which included both offset and digital printers. In addition, Flora Printers had provided similar services to the Procuring Entity in the past. Consequently, its bid was evaluated on merit and the tender awarded to it for being the lowest evaluated bidder.

The Board has carefully considered the representations of the parties and the documents before it. It is apparent that the key issue for determination is whether or not the evaluation of the tenders was done in accordance to the evaluation criteria set out in the tender document. The Board has also perused the copy of the tender document that was issued to the tenderers by the Procuring Entity.

Section VI Technical Specifications of Installations of the tender document provides detailed technical specifications as minimum requirements to guide the prospective bidders on the equipment and their production output.

Arising from a clarification sought by Flora Printers on Section VI of the tender document, the Procuring Entity issued an addendum dated 9th February, 2007 and signed by Mr. Yobesh Oyaro, Procurement and Supplies Manager. It read in part as follows:

“Pursuant to clause 2.5 of the tender document, the Authority hereby issues the following addenda:

1. **Question:** Could you please delete the entire Section VI in the tender document and replace it with the wording “complete Printing Shop Equipment including Two or Three Offset Printing Machine/Guillotine/Dark Room/Binding Machines/ Computers etc”?

Answer: The specifications given are for High Speed Photocopiers, Variable Data Printers and Finishing Equipment. For office printing requirement is for day to day short-run low volume office printing. Suppliers are free to get the Offset machines of their choice that will do the task.

The detailed requirements in the tender document mentioned under Section VI are for high volume monthly quantities. These specifications will serve the requirements of the Authority as required. Bidders are free to choose equipment of their choice that satisfy specifications requirements as given in the tender documents...”

This addendum was issued pursuant to Section 53 of Public Procurement & Disposal Act, 2005 and Clause 2.5 of the Instruction to Tenderers. It therefore became part of the tender document and was to be complied with.

After a critical perusal of this addendum, the Board notes that the question raised by the candidate was in two parts; it requested

deletion of the entire Section VI of the tender document, and secondly, to replace that section with the wording:

“complete Printing Shop Equipment including Two or Three Offset Printing Machine/Guillotine/Dark Room/Binding Machines/ Computers”.

In the response given by the Procuring Entity, it opened up for other types of machines that could do the task, but did not respond categorically to the second part of the question. Instead, it only emphasized the purpose of the specifications set out in the tender document. It was therefore uncertain as to whether or not bidders were to prepare their bids based on the specifications provided in the tender document.

At the hearing, the Procuring Entity admitted that Section VI on the technical specifications was retained despite the amendments on the tender document through the addendum. However, the Procuring Entity evaluated the tenders based on the schedule of requirements under Section V.

The technical evaluation was done based on requirements set out under Clause 2.32 of the tender document. One of the factors to be considered was performance detail of Equipment to be used. Whereas there were technical specifications at schedule VI for digital machines, there were no corresponding technical specifications for offset machines.

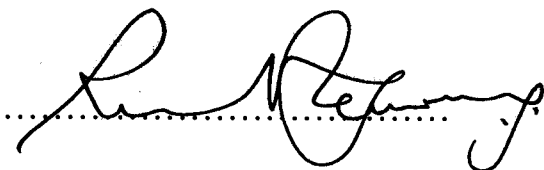
In our view, since the Procuring Entity was not procuring equipment, it ought to have specified in the tender document that the evaluation of the tenders would be performance based. The Procuring Entity should therefore have provided an evaluation criteria based on performance and not on the equipment. This way, it would have been open to the bidders to offer any type of machine, whether offset or digital, so long as it would have met the job performance requirements.

On the argument by the Procuring Entity that it had stated its requirement in Section V Schedule of Requirements which were used as the basis for evaluation of tenders, the Board notes that there was a mismatch between the evaluation criteria and the Schedule of Requirements set out by the Procuring Entity. The Technical Evaluation criteria were designed to evaluate six items, none of which seemed to relate to the five items specified in the Schedule of Requirements. This discordance was not explained at the Hearing nor did we see an explanation of it in the Procuring Entity's evaluation report. This was inconsistent with Section 34 of the Public Procurement & Disposal Act, 2005 which, among other things, requires the Procuring Entity to prepare specific requirements relating to the goods, works or services, that are clear, correct and complete to allow fair and open competition amongst the tenderers. In view of the above it was not possible for the Procuring Entity to conduct an objective, fair and balanced evaluation as required under the law.

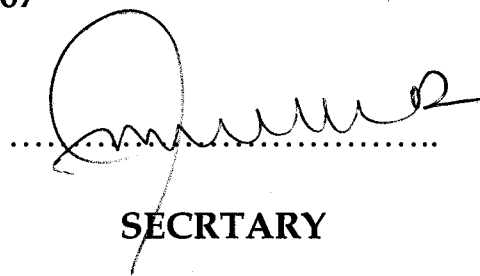
Accordingly, these grounds of appeal succeed.

Taking into consideration all the above matters, the appeal succeeds and we hereby annul the award of the tender, and order that the Procuring Entity may re-tender using clear specifications.

Dated at Nairobi this 27th day of June, 2007



CHAIRMAN



SECRETARY